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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE E. GARAY, Defendant and Appellant.	B290094 (Los Angeles County Super. Ct. No. BA448426)

APPEAL from an order of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed.

Andy Miri for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan M. Krauss and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jose E. Garay appeals his convictions of three counts of child molestation. He argues that the court committed evidentiary and instructional errors, and that substantial evidence does not support his convictions. We find no error and affirm on all grounds.

FACTS AND PROCEDURAL BACKGROUND

1. Defendant's Molestation of Regina

In January 2016, a teacher referred 12-year-old Regina to her middle school counselor because Regina had cuts on her wrists and forearms. The school counselor observed that Regina appeared sad and inquired about the cuts. Regina told the counselor that she was cutting herself because she felt stressed and defendant, her uncle, had touched her on two occasions. The counselor reported Regina's disclosure to law enforcement.

Officer Martinez interviewed Regina. She told him that in July 2015, she attended a party at defendant's home. While at the party, defendant called her into his bedroom, where he was lying on the bed. He asked to touch Regina's breasts. Regina responded no. Defendant then asked a second time and put his hand on Regina's shoulder. Regina exited the room and avoided contact with defendant for the rest of the day.

Regina also described to Officer Martinez a second incident that occurred two years earlier during another party at defendant's home. On that occasion, Regina went to defendant's bedroom to retrieve a toy. Defendant was already in the room when she entered. Defendant grabbed and squeezed Regina's chest over her clothing. Regina pushed defendant's hand away. Defendant next reached for her vaginal area and came within inches of touching her before she again pushed his hand away. Defendant then lowered his pants and exposed his penis. Defendant grabbed Regina's hand and began to guide it toward

his penis. Regina managed to pull her hand back before it touched defendant. She ran out of the room and did not report this incident to anyone.

2. Defendant's Molestation of Angelica

During the investigation of defendant's conduct with Regina, police learned of a previous victim, Angelica, who was born in May 1984. When Angelica was 12 or 13 years old, she met and began "dating" defendant, who lived across the street from her. She assumed defendant was around 18 years old based on his appearance, and that he was no longer in school and could drive. Defendant, born in December 1973, was actually more than ten years older than Angelica. Defendant was persistent in initiating sex, and their relationship became sexual. In addition to sexual touching, they eventually had intercourse in defendant's car, his home, and motels.

When interviewed by police in 1998, defendant admitted to having sex with Angelica for the first time a few months before January 1998, when Angelica was still 12 years old. Defendant said he approached Angelica's mother and asked for permission to date Angelica. Defendant learned that Angelica was 12 years old at some point prior to December 1997, but continued to "date" her. Defendant knew Angelica was only 12 or 13 years old when they had intercourse.

Following the police investigation and defendant's arrest, defendant pleaded either guilty or no contest to molesting Angelica in 1999 (Pen. Code, § 288a – lewd act with a child under 14).[1] The District Attorney reported to the trial court below that his conviction was eventually "dismissed" because defendant had

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[1] All subsequent statutory references are to the Penal Code unless indicated otherwise.

not been properly advised of the immigration consequences of his plea.

Defendant resumed seeing Angelica. They had intercourse in his apartment. Angelica had not disclosed the continuing sexual relationship that occurred after defendant's arrest until she was contacted by police in 2016 as part of the Regina investigation.

3. Charges and Trial

In an amended information, defendant was charged in counts 1 and 2 with lewd acts upon a child under 14 years of age (Regina) as described in section 288, subdivision (a), and in count 3 with lewd acts upon a child 14 or 15 years of age (Angelica) pursuant to section 288, subdivision (c). As to count 3, the People alleged the criminal complaint was filed within one year of the date it was first reported to a California law enforcement agency.[2]

Trial commenced in March 2017. The People presented testimony from the police officers involved in the current and 1998-1999 investigations, Regina's school counselor, and the two victims. Victim Angelica's testimony was consistent with the facts stated above and as developed during the previous investigation. In connection with defendant's molestation of Angelica, the People introduced a written statement defendant signed in 1999, admitting to having had sex with Angelica when she was 12 or 13 years old. Although the jury was informed that police had investigated defendant's earlier molestation of

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[2] Under section 803, subdivision (f), "a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under 18 years of age, was the victim of a crime described in [s]ection . . . 288."

Angelica, it was not advised either of the conviction or the subsequent dismissal.

Victim Regina testified that she had reported to her school counselor and Officer Martinez that defendant had molested her more than once. When asked about the two incidents, Regina said she could not remember them. The prosecutor walked Regina through the details of each incident and asked Regina if she described these events to her school counselor and/or Officer Martinez. Regina generally responded that she thought she had reported these events to the counselor and Officer Martinez. When asked how she felt about the situation of prosecuting her uncle, she stated "I feel like I did something wrong . . . . Because what I had told them wasn't true." The school counselor and Officer Martinez testified to statements Regina made when she initially reported the molestations.

The People also introduced expert testimony about Child Sexual Abuse Accommodation Syndrome from a clinical psychologist specializing in treating and evaluating victims of child sexual abuse. The expert explained why child victims delay reporting abuse or recant their accusations.

Defendant presented no evidence. The jury found defendant guilty as charged and found true the allegation that the complaint for count three was filed within one year of Angelica reporting the molestation to law enforcement. The trial court sentenced defendant to an aggregate term of 12 years in prison.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues (1) the trial court erred in admitting "fresh complaint" hearsay, and otherwise prejudicial (Evid. Code, § 352) testimony from the school counselor and Officer Martinez who had interviewed Regina, (2) the court should not have

admitted defendant's signed statement, (3) the court improperly instructed the jury with CALCRIM No. 1190, (4) his convictions for molesting Regina are not supported by substantial evidence, and (5) there was insufficient evidence of the ages of both the victim and defendant for the charge of molesting Angelica. We address each issue in turn.

1. The Court Did Not Abuse Its Discretion in Admitting the Testimony of the School Counselor and Officer Martinez

Defendant argues that the court erred in admitting testimony from the school counselor and Officer Martinez recounting Regina's statements about the molestations. He asserts the statements were impermissible hearsay that created the danger of undue prejudice. We treat the objection as based on hearsay and Evidence Code section 352, and review the court's decision for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.)[3]

a. The Pertinent Testimony

At trial, Regina's school counselor testified that Regina was called into her office for cutting her wrists and forearms. The counselor explained that when she asked Regina why she was self-harming, Regina responded that she was stressed because her uncle touched her on two occasions, one about two years earlier and the other six months prior to the conversation with the counselor. The counselor did not provide details about the

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[3] The prosecutor filed a motion pretrial entitled, "People's Motion to Admit 'Fresh Complaint' Testimony Pursuant to Evidence Code Section 402." At the hearing on the motion, court and counsel discussed the "fresh complaint" doctrine as well as Evidence Code section 352. After a recess, defense counsel objected on hearsay grounds. Ultimately the trial court admitted the evidence.

two incidents and testified that Regina did not tell her the details.

Regina testified next and was uncooperative on direct-examination. She stated she could not remember what happened but confirmed she did report the molestations to the counselor and Officer Martinez. At the end of her testimony, Regina stated that her accusations against her uncle were untrue. Following Regina's testimony, Officer Martinez testified about the details Regina had provided him about the two molestations, testimony which we have described in the background section of this opinion.

b. The Court Did Not Abuse Its Discretion in Admitting the Testimony

We conclude that the counselor's statements were admissible under the fresh complaint doctrine and Officer Martinez's statements were admissible as prior inconsistent statements. None of this testimony was precluded by the hearsay rule. We also conclude that the testimony was not unduly prejudicial and thus admissible under Evidence Code section 352.

i. Fresh Complaint Evidence

In general, out-of-court statements used to prove the truth of the matter asserted are inadmissible hearsay, except as provided by law. (Evid. Code, § 1200.) Under the fresh complaint doctrine, out-of-court statements by a molestation victim disclosing the assault can be introduced at trial not for the truth of the matter, but to show the circumstances in which the victim reported the incident. (*People v. Brown* (1994) 8 Cal.4th 746, 749–750 (*Brown*).)

Our Supreme Court has explained the doctrine: "[P]roof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of,

and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred. Under . . . generally applicable evidentiary rules, the timing of a complaint (e.g., whether it was made promptly after the incident or, rather, at a later date) and the circumstances under which it was made (e.g., whether it was volunteered spontaneously or, instead, was made only in response to the inquiry of another person) are not necessarily determinative of the admissibility of evidence of the complaint. Thus, the 'freshness' of a complaint, and the 'volunteered' nature of the complaint, should not be viewed as essential prerequisites to the admissibility of such evidence." (*Brown*, *supra*, 8 Cal.4th at pp. 749–750.)

Under the doctrine, evidence of the victim's disclosure of the alleged offense should be "limited to the fact of the making of the complaint and other circumstances material to this limited purpose." (*Brown, supra,* 8 Cal.4th at p. 763.) Although "details" are not allowed, limited relevant evidence may be admitted. (*Id.* at pp. 756, 760.)

Here, the counselor's testimony was properly admitted under the fresh complaint doctrine. The counselor solely testified to the circumstances and timing in which Regina reported the molestation to her. The counselor provided no details regarding the molestations besides testifying that Regina indicated there were two incidents occurring, respectively, two years and six months before the conversation with Regina. We find no abuse of discretion in admitting this evidence.

ii. Prior Inconsistent Statements

We conclude Regina's statements to Officer Martinez were properly admitted as prior inconsistent statements, and thus did

not constitute hearsay. " 'A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.' [Citation.] 'The "fundamental requirement" of section 1235 is that the statement in fact be inconsistent with the witness's trial testimony.' [Citation.] ' "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement. . . ." ' [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 462, 113, fn. omitted; *People v. Zapien* (1993) 4 Cal.4th 929, 951–952.)

Regina's in-court, express recantation of any sexual abuse was inconsistent with her statements to Officer Martinez that defendant had twice molested her. Accordingly, the statements Regina made to Officer Martinez were admissible for their truth. " 'A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.' " (*People v. Sapp* (2003) 31 Cal.4th 240, 296, *as modified*, Oct. 15, 2003.)[4]

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[4] We observe that Regina's assertions that she did not remember the molestations also qualify as inconsistent statements, given the expert testimony introduced to explain why victims recant. The Supreme Court has explained: " '[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 711.)

iii. Evidence Code Section 352

We also conclude that the court did not abuse its discretion in admitting the testimony from the counselor and Officer Martinez under Evidence Code section 352. Preliminarily, we observe that defendant has barely preserved the issue on appeal by his cursory references to section 352 in his opening brief. We address the point nonetheless. "Under section 352, a trial court may in its discretion exclude material evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

Here, the testimony from the counselor and Officer Martinez was highly probative on the molestation of Regina. It went directly to Regina's credibility and defendant's criminal acts. Although prejudicial in the sense that it was certainly adverse to defendant, the testimony was not unduly prejudicial or inflammatory when considered in light of testimony regarding defendant's conduct with Angelica. There is no indication that this testimony unduly consumed time, created issue confusion, or misled the jury.

2. The Court Did Not Abuse Its Discretion in Admitting Defendant's Signed Statement About His Prior Uncharged Bad Acts

Defendant argues that the trial court erred in admitting his 1998 signed statement to police confirming a sexual relationship with Angelica when she was 12 or 13 years old. We review the

court's decision to admit or exclude evidence for abuse of discretion. (*People v. Jackson* (2016) 1 Cal.5th 269, 330.)

a. Relevant Proceedings

On January 5, 1999, defendant pled guilty to one count of lewd act upon Angelica who was under the age of 14 at the time. Apparently, the conviction was dismissed due to the prosecutor's failure to advise defendant of the immigration consequences of his plea. As part of the police investigation leading up to the plea, defendant had signed a statement admitting to having sex with Angelica when she was 12 or 13 years old.

Prior to trial, the prosecution moved to admit defendant's written statement pursuant to Evidence Code sections 1108 and 352. Defendant objected on the latter ground. The court ruled that the conduct giving rise to defendant's earlier conviction was admissible, but any reference to "the fact he was convicted and that the conviction was set aside" was to be excluded.

At trial, a retired police detective testified that in 1998 she investigated a child sexual abuse case involving Angelica, in which defendant was the suspect. As part of her inquiry, the detective interviewed defendant and prepared a written statement, which defendant signed. Part of the written statement was read to the jury and received into evidence:

> "[Defendant] dated [the victim] for 3-4 mon[ths] before [Defendant] found out [the victim's] true age (at that time 12 yrs). . . . [Defendant] admits to having sexual intercourse with [the victim] a few months [prior to January 26, 1998]. [Defendant] dated [the victim] with the permission of victim's mother . . . but did not tell [the mother] that they had begun sexual relations."

b. Applicable Law

Evidence of other crimes or bad acts is generally inadmissible when offered to show a defendant had a criminal disposition or propensity to commit the crime charged. (Evid. Code, § 1101, subd. (a); *People v. Robertson* (2012) 208 Cal.App.4th 965, 989.) Evidence Code section 1108, subdivision (a) creates an exception to this rule: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

The Supreme Court in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), addressed whether the trial court properly admitted under Evidence Code section 1108 propensity evidence of a defendant's prior sexual offense. The *Falsetta* court stated that trial courts "must engage in a careful weighing process under [Evidence Code] section 352" by "consider[ing] such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses. . . ." (*Falsetta*, at p. 917.)

c. No Abuse of Discretion

In the signed statement defendant submitted to the police, defendant admitted he had molested Angelica when she was 12 and 13 years old. Defendant made this admission within months of the molestations. The statement is highly probative of Angelica's credibility and supports her testimony that defendant

resumed molesting her several months after he was arrested. The trial court reasonably concluded the probative value of this evidence was not outweighed by section 352 concerns. There was little risk of juror or issue confusion. The jury verdict forms clearly identify the 1999 time frame for count three (Angelica's molestation), ensuring that jurors understood that charge to relate to defendant's later molestations of Angelica, not the earlier dismissed charges. There also was little risk of undue consumption of time as the pertinent testimony was very short.

Although the evidence was prejudicial to defendant as it tended to prove his guilt, it was not unduly so. All "evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is prejudicial. The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638 (internal quotation marks omitted).)

Here the jury heard evidence of two separate molestation acts on Regina and one act involving Angelica comprising the three charges against defendant. Additional testimony about an earlier act of molestation involving one of the two complaining witnesses was not inflammatory.

3. Defendant Has Forfeited His Challenge to the Statute of Limitations and therefore, his CALCRIM No. 1190 Argument Fails

Defendant asserts the trial court erred when it instructed the jury with CALCRIM No. 1190, which states that "conviction of a sexual assault crime may be based on the testimony of a

complaining witness alone."[5] He contends this was error because pursuant to section 803, subdivision (f)(2)(C) – the special allegation in count 3 – independent evidence *was* required to corroborate Angelica's testimony to extend the statute of limitations for filing a criminal complaint. Under section 803 subdivision (f)(1), with certain exceptions not relevant here, "a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under 18 years of age was the victim of a crime described in . . . Section 288 . . . ." Count 3 alleges a violation of section 288. However, this extension applies only if, "There is independent evidence that corroborates the victim's allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation." (§ 803 (f)(2)(C).)

As we understand defendant's CALCRIM No. 1190 argument, that instruction tells the jury that no corroboration of the assault victim is required but section 803, subdivision (f)(2)(C) requires, corroboration for statute of limitations purposes. Hence the jury could have been confused and CALCRIM No. 1190 should not have been given. Whether that argument might have some traction in other situations, it does not here. Defendant did not raise a statute of limitations defense; hence no instruction on section 803 corroboration was

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[5] The trial court also instructed with CALCRIM No. 301, which provides: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." Defendant does not claim on appeal that the court erred in giving CALCRIM No. 301.

given and the jury was not asked to make a corroboration finding. The jury could not have possibly been confused.[6]

Defendant's argument is more of a disguised challenge based on the statute of limitations. Yet, defendant forfeited any such argument by his failing to raise it below ~~this issue~~.

"As a general rule, the trial court need only instruct on the statute of limitations when it is placed at issue by the defense as a factual matter in the trial." (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1192.) Even though the verdict form had a section 803 finding on the one year cut-off, defendant never raised a statute of limitations defense at trial. Defendant does not argue the contrary on appeal.

As the court in *People v. Thomas* (2007) 146 Cal.App.4th 1278 (*Thomas*) observed, when the information alleges that the defendant "committed the charged offense outside the limitations period" and contains "no other facts or tolling allegations that ma[k]e the prosecution timely," a claim that the prosecution is time-barred is not forfeited and may be raised at any time. (*Id.*, citing *People v. Williams* (1999) 21 Cal.4th 335, 341.) However, when the information alleges facts that support an extension of the limitations period, the defendant must raise the limitations

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[6] As part of CALCRIM No. 3410, the jury was instructed that defendant could not be convicted of count 3 "unless the prosecution began within one year of the date the crime was discovered." The court then told the jury what a stipulation was and that the parties had stipulated to the following: "The parties stipulate that prosecution of Count 3 commenced with one year of discovery. Angelica M. disclosed to LAPD Detective Castillo the conduct that is the basis for Count 3, PC 288 (c)(1) on May 4, 2016. The charge was originally prosecuted on July 19, 2016, with one year of the date the crime was discovered."

in the trial court or it is forfeited. (*Thomas*, at pp. 1282, 1288–1289.)

Here, as in *Thomas*, the prosecution filed a charging document that was facially timely. The amended information was filed on November 16, 2016, and expressly alleged that Angelica reported the incident to the police on May 4, 2016, well within the one-year period of section 803, subdivision (f). (See *Thomas, supra,* 146 Cal.App.4th at p. 1289.) Not only was the information not facially time-barred, as we have already observed in the margin, defendant stipulated to compliance with the one year period. By failing to raise corroboration for statute of limitations purposes in the trial court, defendant forfeited the point. He cannot now complain that the trial court erred in instructing with CALCRIM No. 1190 or failed to properly instruct on the statute of limitations.

Defendant's opening brief entirely fails to address forfeiture. His reply brief skims the issue, summarily concluding that because there is no corroborating evidence, there was a miscarriage of justice. Even if we were to address the merits of defendant's statute of limitations argument, defendant's written statement admitted to molesting Angelica on prior occasions thus corroborating Angelica's trial testimony.

4. Substantial Evidence Supported Defendant's Convictions for Molesting Regina on Two Separate Occasions

Defendant argues his two convictions for committing lewd or lascivious acts on Regina were not supported by substantial evidence. "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People

and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Jones* (1990) 51 Cal.3d 294, 313–314.)

Defendant's argument is not that his conduct did not constitute lewd and lascivious acts on a child under 14 years old. Rather, he argues that Regina's recantation dispelled the sufficiency of the evidence. We disagree.

Here, there was substantial evidence that defendant molested Regina on two occasions. Although Regina recanted, the clinical psychologist specializing in treating and evaluating victims of child sexual abuse provided expert testimony explaining that child victims delay reporting abuse and recant their accusations because of Child Sexual Abuse Accommodation Syndrome.

The school counselor described how Regina initially reported the abuse. Officer Martinez then testified to statements Regina made to him about the specific lewd and lascivious acts defendant committed on two separate occasions. As we have explained, the jury could properly consider this testimony for the truth of the matter asserted. Based on this collective evidence, the jury could reasonably conclude that Regina's earlier reports of molestation were credible and that her later recantation was not.

5. Substantial Evidence Supported the Jury's Finding that Defendant was Ten Years Older than 14- or 15-year-old Angelica at the Time of the Molestation

Defendant was convicted of committing lewd acts on Angelica pursuant to section 288, subdivision (c), which required Angelica to be "a child of 14 or 15 years" and defendant to be "at least 10 years older than" her. Defendant argues there was insufficient evidence to support his conviction in count 3, because there was no evidence that Angelica was 14 or 15 when the crime

occurred, or that defendant was at least 10 years older than Angelica. We disagree.

Angelica testified that her birth date was in May 1984. Therefore, Angelica turned 14 years old in May 1998 and 15 in May 1999. Angelica stated that she met defendant in 1998 when she was 13 years old. Angelica testified that the police initially contacted her in 1998 and her sexual relations with defendant ended at that time, but resumed just a few months later. Angelica testified that she was attending junior high school when defendant resumed having sex with her.

Angelica testified that after defendant's arrest, defendant had sex with her in 1998 when she was 14 and again a few months later when she was either 14 or 15 years old. On cross-examination, Angelica testified that she could not remember the specific month that the second incident occurred but that she was sure that it was in 1999 and after defendant's arrest for the first series of molestations. This evidence is sufficient to establish that she was 14 or 15 when the abuse occurred. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1418 ["The testimony of one witness is sufficient to prove any fact."]; Evid. Code, § 411.)

The prosecution also introduced a Department of Motor Vehicles record for defendant, which listed his date of birth as December 6, 1973. Based on this evidence, defendant is ten years and five months older than Angelica.

Substantial evidence supported both the victim's and defendant's ages for conviction of lewd or lascivious acts on Angelica pursuant to section 288, subdivision (c).

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DISPOSITION

The judgment is affirmed.

RUBIN, P.J.

WE CONCUR:

BAKER, J.

KIM, J.